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Lehi Irrigation Company v. Clarence T. Jones and Ed H. Watson : Reply of State Engineer to Brief of Amicus Curiae

Utah Supreme Court

Edward W. Clyde; Special Ass't. Attorney General;

7189

In the Supreme Court of the State of Utah

LEHI IRRIGATION COMPANY,

Plaintiff and Appellant,

vs.

CLARENCE T. JONES and ED. H. WATSON, State Engineer of the State of Utah,

Defendant and Respondents.

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Until the brief of the Amicus Curiae was filed the State Engineer took no part in the court proceedings had herein. He neither participated in the submission of the facts nor in writing of the brief on appeal. This failure of the State Engineer to participate actively in the court proceedings was prompted by the fact that it appeared by the pleadings simply to be a private dispute between two water users over the right to use waters then running to waste.

The Provo River Water Users Association has presented issues of much public importance in the future development of water law in this state. The State Engineer thinks that it would be unfortunate if the issues raised by the Amicus Curiae were to be decided upon their merits here. Many of the parties who ultimately will be affected by such a decision are not before the court and their views in the matter have never been presented. Many of the facts essential to the determination of the questions here presented are not before the court. The Amicus Curiae simply seeks to have this court lay down a rule of law which underrules of stare decisis will control this issue when it is finally presented by the real parties in interest upon all the material facts. It is not necessary for the Supreme Court to make such a determination in the instant case and we assert that the court should not do so.

ROLE OF THE COURTS IN REVIEWING THE DECISION OF THE STATE ENGINEER

We, at the outset, ask the court to cast itself in the role of the State Engineer confronted with the problem of determining the issues of this case. We ask the court to do this because it has already said, on more than one occasion, that on review from the decision of the State Engineer the issues before the court are no broader than were the issues presented to the State Engineer. See for example Eardley v. Terry, 94 Utah 367, 77 P. 2d 362, wherein the Supreme Court expressly stated that on review of the decision of the State Engineer the district court, which hears the matter de novo, can do no more

than the State Engineer; and that on appeal to the Supreme Court the issues are limited to those which confronted the State Engineer in the approval or rejection of an application.

In reviewing the State Engineer's decision therefore, this court should assume the role of the State Engineer. The Supreme Court has time and again told the State Engineer that he has no judicial power and that he must not attempt to decide judicial questions or determine vested rights except in a very general way. See Little Cottonwood v. Kimball, 76 Utah 243, 289 P. 116; Eardley v. Terry, supra; Whitmore v. Murray City, 107 Utah 445, 154 P. 2d 748.

The action of the State Engineer in approving an application is therefore not a judicial procedure. The State Engineer must not attempt to adjudicate vested rights. His problem is simply one of determining whether or not, under the rules laid down by the Supreme Court and the provisions of Section 100-3-8, U.C.A. 1943, the application should be approved. In approving the application the State Engineer need not find affirmatively that there is unappropriated water in the named source. It is sufficient that he determine that there is a reasonable probability that the application can be perfected. New applications should be favored, not hindered; reasonable doubt as to whether the application should be approved or rejected should be resolved in favor of approval. It is only where there is no probability that the application might be perfected that the State Engineer should deny the application. Such was the holding of the

court in *Rocky Ford Irrigation Co. v. Kents Lake Res. Co.*, 104 Utah 202, 135 P. 2d 108. This has been the consistant holding of this court. See *Little Cottonwood v. Kimball,* supra; *Eardley v. Terry,* supra. In the Rocky Ford case the Supreme Court said that an application to appropriate must be approved, unless it "clearly" appears that there is no water available. Cases of doubt must always be resolved in favor of approval. Thus the court, acting in the role of the State Engineer, should not reject an application unless it clearly appears that there is no unappropriated water available.

The reason why the court has uniformally held that doubts should be resolved in favor of the application is that the approval of an application could not possibly affect vested rights. Statements to this effect have run through the court opinions for the past forty-five years. In *Yates v. Newton,* 59 Utah 105, 202 P. 208, the court said that no order of the State Engineer can disturb vested rights in water. In *Eardley v. Terry,* supra, the court said that no final rights are acquired until proof of appropriation, required by Section 100-3-16, is made and a certificate of appropriation has been issued. In *Sowards v. Meagher,* 37 Utah 212, 108 P. 1112, the court held that the application to appropriate was nothing more than a preliminary notice of intent. The State Engineer should examine the application to ascertain the declared intent and, if there is any reasonable probability to believe that a right might be perfected, the State Engineer has been told by this court that he should approve the application.

SHOULD THE APPLICATION HAVE BEEN APPROVED?

It is argued by the Amicus Curiae that there is no unappropriated water; that this record shows, without any shadow of a doubt, that the waters in question are owned by the Provo River Water Users Association. The problem presented is not simple nor is the answer so clear. In the first place all Provo River Water Users Association has is an application to appropriate water. An application to appropriate is not an appropriation. It is but a preliminary notice of intention. There is no appropriation of the water until certificate of appropriation issues. Therefore, so long as there are only applications on a stream *all* of the waters thereof are unappropriated and new applications ought not to be rejected. It is not anticipated that this principle of law will be seriously controverted. The Utah court has, time and again, said that an application to appropriate is not a completed appropriation. See *Sowards v. Meagher,* supra; *Robinson v. Schoenfeld,* 62 Utah 233, 218 P. 1041; *Deseret Livestock Company v. Hoopiania,* 66 Utah 25, 239 P. 479; *Little Cottonwood Water Co. v. Kimball,* supra; *Duchesne County v. Humphreys,* 106 Utah 332, 148 P. 2d 338.

Thus if we assume a given stream yielding 10 c.f.s. upon which applications to appropriate totalling 40 c.f.s. have been filed, we still cannot conclude that all of the water in the stream has been appropriated. In fact none of it has. It is not until the water is put to beneficial use and a certificate of appropriation has issued that the court or the State Engineer can conclude that an appro-

priation has been made. So long as an application is pending there are numerous places where, because of delays, the priority date of the application may lapse, thus validating a junior filing. Likewise an applicant may file for 5 c.f.s. but when it comes to making proof of appropriation he may only show that 1 c.f.s. has been used. These reasons, among others, have prompted the court consistently to hold that the application, even though in good standing, is not an appropriation. Therefore public waters which are covered only by approved filings cannot be considered to be appropriated. New filings should be accepted until such time as proof is submitted. It is therefore respectfully submitted that this record clearly shows, even if the facts brought into the record by the brief of the Amicus Curiae are assumed to be true, that the waters in question are still unappropriated in that nothing has been done to appropriate them except the filing of an application. Since that application may lapse, or since proof may not be submitted, the law does not permit the State Engineer to reject new applications on the same water. Such new applications ought not to be rejected until the water has been actually appropriated and a certificate of appropriation has issued.

WATERS RUNNING TO WASTE ARE UNAPPROPRIATED WATERS

There is another factor which indicates that the waters in question are unappropriated. The Supreme Court said in the case of *Falkenberg v. Neff,* 72 Utah 258, 269 P. 1008, that where the plaintiff and defendant

both held approved applications and the defendant's was prior in time, the defendant had no right to complain of the diversion of water by the plaintiff if the defendant was not then in a position to use the water beneficially. *That at such times as a prior appropriator is not using the water for a beneficial purpose such waters are considered and treated as unappropriated public waters and for such period of time are subject to appropriation and use by others.*

To the same effect see *Adams v. Portage Irr. Res. & Power Co.*, 95 Utah 1, 72 P. 2d 648. The court there said that though the flow of water may be within the quantum of water to the use of which an appropriator has a preferential right, during any time it is not being used beneficially and economically it still is, remains or becomes *publici juris* subject to all common rights of the public to appropriate and use. There are other cases in the Utah reports to like effect. No one can hold a right to waste water. At such times as he is not, by virtue of a prior appropriation, using the water he cannot complain at use of the water by others. Water running to waste is for the moment public water, subject to appropriation and use.

This case was presented to the State Engineer as a private dispute between an irrigation company and a landowner, on whose land waters arise by seepage. Each claimed a superior right to use the water. At the time of the dispute the waters were running to waste. The State Engineer, by approving the application, simply intended to settle the immediate dispute between those two users

and to recognize in Jones a superior right of use because he had filed on it and Lehi Irrigation Company had not. The approval order was expressly made "subject to prior rights." Certainly under the cases cited next above there was a sufficient showing to justify the approval of the application. Whether or not the Provo River Water Users Association can later reassert the right to capture this water is entirely foreign to this law suit. The water was unappropriated because (1) no one had perfected an appropriation on it (there were only applications which had not yet ripened into appropriations) and (2) the waters were running to waste and the Supreme Court has said that when the waters are running to waste they become *publici juris* and others may appropriate and use them, subject to prior rights.

Under such a state of the facts the State Engineer was required to approve the application. There was, under the adjudicated cases, an affirmative showing that the waters in question were unappropriated. But certainly one can say that there is a reasonable basis for believing that a right of use might be perfected.

WATERS WHICH HAVE ESCAPED ARE PUBLIC WATERS

There is much in the Utah cases to indicate that once water escapes from the lands of an original appropriator he may not follow that water into or upon the lands of another and there recapture it. There are also holdings to the effect that once water returns to a natural channel or source, and there commingles with other waters, the right of the original appropriator is lost; that

the water becomes public water subject again to appropriation. The cases to follow are not cited for the purpose of asking the court to rule against the Provo River Water Users Association on the merits. They are merely cited to demonstrate that the State Engineer was confronted with a situation in which he could legally believe that there was a reasonable basis for believing that a right might be perfected. See for example *Clark v. North Cottonwood Irr. & Water Co.*, 79 Utah 425, 11 P. 2d 300. This was a suit to quiet title to the waters of North Cottonwood Creek. The plaintiff sought to establish a right to waters that had seeped back to the main channel after having been used by the plaintiff for irrigation. The court said that it is quite generally held that one may not acquire a perfected right to have seepage water kept up, but when seepage water finds its way back to the natural stream from which it originally came such water may be appropriated and again diverted and used upon other lands. All of the parties to this litigation, the court said, proceeded well they might upon the theory that the seepage water in controversy was subject to appropriation. The facts clearly showed that the seepage water in question drained from irrigation back into the natural channel and again became a part of the natural stream.

In the instant case it is clear that the waters in question did escape the control of the original appropriator. They had manifest themselves in the form of springs and seeps on the lands of Jones; they had returned to a natural source of supply and the North Cottonwood case states that they became open to appropriation.

The State Engineer believes that the court must yet straighten out the law in regard to the right of a party to follow or recapture seepage water. It appears to us that in this regard the law is in a state of flux; that whether or not the Provo River Water Users Association is going to be able to follow this water through the lands of others and into Utah Lake is an important legal question. There is much in the Utah cases to suggest that this water has become public water because it has escaped. Whether the law finally becomes settled along those lines or not there certainly now is a reasonable doubt as to whether or not this applicant can perfect an application. There are at least three theories upon which he might eventually prevail. (1) That the water is not appropriated because there is no perfected appropriation covering it, (only applications); (2) that the water was at the time going to waste and that water while wasting is public water open to appropriation, and (3) waters which have escaped from the control of the original appropriator and found their way back into a natural source of supply again becomes public water, open to appropriation; that the right to recapture and reuse water requires that you keep the water under control and in your possession and that if it escapes, then, like the wind and the sunshine and the air, it becomes free by nature and public in character. At least it must be said at this point that there is a reasonable basis for believing that this applicant can perfect a filing.

THERE ARE OTHER PARTIES WHO SHOULD BE BEFORE THE COURT AND OTHER FACTS THAT THE COURT SHOULD HAVE AT ITS DISPOSAL BEFORE RULING

ON THE QUESTION OF OWNERSHIP OF THIS WATER BY PROVO RESERVOIR COMPANY.

Since the State Engineer has no judicial powers, and since he must not, in passing on an application to appropriate water attempt to adjudicate existing rights, both the State Engineer and the court should inquire into those matters in only a very general way. *Little Cottonwood Water Co. v. Kimball,* supra. There are water users who contend that Utah Lake is, in effect, their private reservoir; that they own the storage capacity of Utah Lake up to a point known as Compromise point and that above that level there is no right to inundate farm lands. Those parties have argued in the past that the Bureau of Reclamation and the Provo River Waters Users Association can not retain title to seepage waters after they escape into Utah Lake and they have indicated that they will oppose any attempt to perfect such a scheme for recapturing and reusing this water. Those parties are not now before the court and this court ought not to make a ruling now which, under principles of *stare decisis,* would control future litigation on this point. Neither Jones nor Lehi Irrigation Company are too much concerned over that point.

Furthermore, there has, from the first, been some question in the mind of the State Engineer and his staff as to whether anyone can store water in Utah Lake and claim that the water was being beneficially used. The area of the lake is so large and the water so shallow that there are tremendous evaporation losses. So much so that the time may well come when this court will hold

that it is not a beneficial use to store water in such a wasteful reservoir.

The waters of the entire area are covered by a general adjudication suit pending before the State Engineer. One day the problems which the Amicus Curiae seeks to raise will be squarely presented to the court by parties who are directly concerned. For the time being this is a private law suit between two small water users, each of whom claims the right to use waters which are running to waste, and which have escaped from the control of the original appropriator. The vested rights of Provo River Water Users Association will not be adversely affected. Their only complaint is that at some future date they may be required to litigate this matter with Jones to recapture the water and that Jones might make a nuisance of himself in interfering with their flow. This court has always told the State Engineer that the mere fact that a man is given the "fighting" right high on a stream is no justification for refusing his application. See Rocky Ford Irr. Co. v. Kents Lake, supra.

SUMMARY

The Supreme Court has told the State Engineer that he has no judicial powers; that he must not, in ruling on an application, attempt to adjudicate or determine vested rights. On the question of vested rights the State Engineer is to make only a very general inquiry. If, after such an inquiry, he has any reasonable basis for believing that a right might be perfected, he is to resolve such doubts in favor of approval. The Supreme Court has also said that an application to appropriate water is not an appropriation and that waters covered only by an application are still not appropriated. The court has also said that waters running to waste are for the time being public waters open to appropriation, and that waters which have escaped from the control of the original appropriator and returned to the natural source of supply again become public waters. All three of the above are present in the instant case and combined they certainly suggest a reasonable doubt as to whether or not all of the waters are appropriated. Therefore, the application should have been approved. The other issues as to ownership raised by the Amicus Curiae simply ask this court to do what it has already told the State Engineer he must not do, to-wit: make an adjudication of vested rights.

Respectfully submitted,

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